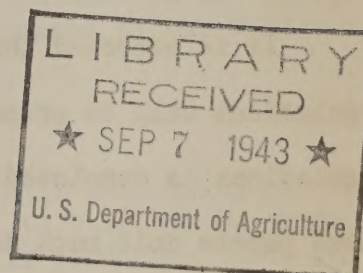


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VIRGINIA STATE MILK CONTROL ACT



PAPER NO. 6. Series on State Milk Control Acts, Dairy Section,
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of Agriculture.

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Introduction

This is one of a series of papers designed to make available, in a condensed and convenient form, information concerning State milk control acts, the type of regulations issued thereunder, and, in general, the legal developments in connection with their administration and enforcement. One paper will be devoted to each State having such an act.

It is expected that a general summary of all the State acts and regulations will be prepared when the review of individual State acts and regulations is completed. In this connection some comparison may be made. These papers omit much detail which might be helpful to those concerned with legislative or administrative problems of State milk control. Those who desire more complete information will undoubtedly find it to their advantage to get in touch with the officials charged with the administration of these acts.

STATE MILK CONTROL IN VIRGINIA
THE ACT, ITS ADMINISTRATION AND LEGAL STATUS

PART ONE

I. General Character of Legislation.

The Virginia Milk and Cream Act (chapter 357, Laws of 1934, approved March 29, 1934) is an emergency measure designed to protect the well-being of the people of Virginia and to promote the public welfare, public health, and public peace. To effectuate these objectives the production, transportation, processing, storage, distribution, and sale of milk and cream^{1/} in the Commonwealth is declared a business affecting the public peace, health, and welfare, to be supervised and controlled pursuant to the police power of the Commonwealth. The emergency period during which the act is to be effective extends to such date as the legislature determines by joint resolution, or as determined by the Governor if the legislature is not in session.

Type of Governing Agency

State Milk Commission.-- The act creates a milk commission of three members to be appointed by the Governor and to hold office or be removed at his pleasure. Two members shall be milk producers in no way connected with the distribution of milk, while the third member shall have no connection financially or otherwise with the production or distribution of milk or its derivative products. While powers of regulation are vested in the commission, the continuous duties of administration are performed by a secretary appointed by the commission and such other personnel as may be required. Members of the commission receive no remuneration except an allowance for each day while on official duty. Services for the commission are performed so far as practicable by personnel in the Department of Agriculture and Immigration and the Extension Division of the Agricultural Experiment Station, without additional compensation. The commission may appoint and at pleasure remove additional and necessary technical and other assistants and employees, chief of whom is the secretary of the commission.

Subordinate to the commission are local milk boards, one for each designated market area. Each board is composed of five members, two of whom shall be producers' representatives, one, or both, being named by

^{1/} Milk is defined in the act to mean clean milk from healthy, properly cared for cows, prepared "with a view of selling it as fluid milk, cream, buttermilk (either cultured or natural buttermilk, and including cultured whole milk in its several trade forms) and skimmed milk;" and the term excludes milk sold or intended to be sold for any other purpose.

the producers' cooperative operating in the market, and two of whom shall be distributors' representatives. The fifth member is appointed by the commission to represent the consumers and the public interest and serves as chairman of the board. "The milk board shall perform such functions as the Milk Commission shall delegate to it."

Conditions Under Which Powers May Be Exercised

The act requires a hearing to precede either the exercise of power by the commission in any market,^{2/} or withdrawal after regulations have been in effect, in addition to a finding that such action will be in the public interest. Such hearings may be called either (1) by the milk commission on its own initiative or (2) upon the application of (a) a properly qualified producers' association, (b) producers, if there be no such association, or (c) distributors; provided, however, that in each instance the applicants are, in the judgment of the commission, supplying or distributing a substantial proportion of the milk consumed in the market.

Compulsory withdrawal.-- The commission is required by the act to withdraw its exercise of powers from any market upon written application by a majority of producers and of distributors (measured by volume of milk produced and of milk distributed, respectively), in said market, acting jointly.

Source of Financing

Revenue to meet the annual budget of the commission is derived from assessments levied by it on local milk boards, not exceeding two cents per hundred pounds of milk handled in each market in which the provisions of the act are in operation. "All receipts from assessments paid under this act shall be paid by the commission to the State Treasurer" and shall be placed by him to the "Milk Commission account". Revenue to meet the expenses of each local milk board, including assessments levied by the commission, is derived from assessments not to exceed four cents per hundred pounds "of milk and/or cream (converted to terms of milk of four percent butterfat)", equally divided between producers selling and distributors handling such milk or cream. No license fees of any kind are required by the act.

^{2/} "Market" is defined to mean "any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area."

Statutory Protective Provisions

The validity of the act is sought to be preserved by the inclusion of first a separability clause to the effect that if any portion is held to be invalid the remaining provisions shall not be affected, and second, a saving clause declaring that nothing in the act shall apply or be construed to apply to foreign or interstate commerce, except as may be effective in accordance with the United States Constitution and laws of the United States enacted pursuant thereto.

II. Regulatory Provisions.

Powers of the Commission

Investigation.-- The Commission is empowered to investigate "all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the Commonwealth of Virginia." The commission "may examine into the business, books and accounts" of any milk producer, association of producers, or milk distributors, their affiliates or subsidiaries, or others; may issue subpoenas to these persons^{3/} and require them to produce their books and records;^{4/} may take depositions of witnesses within, or without, the state. It may also have access and entry to all places where milk is stored, bottled, or manufactured into food products and the power to inspect books and records in any place within the State. All information gained through entry to books and records "shall be confidential, unless the parties concerned agree to its being given out," but the commission may combine and make public such information for any market.

Mediation and arbitration.-- The commission is empowered "to act as mediator or arbiter in any controversial issue that may arise among or between milk producers and distributors, as between themselves, or that may arise between them as groups."

Licensing powers.-- The commission is empowered to license all distributors^{5/} in any designated market "for the purpose of carrying out the provisions of this act." Application for license shall be made

^{3/} "Person" means "any person, firm, corporation or association."

^{4/} "Books and records" means "books, records, accounts, contracts, memoranda, documents, papers, correspondence, or other data, pertaining to the business of the person in question."

^{5/} "Distributor" is defined to include any person engaged in the business of distributing, marketing, or handling "fluid milk, in whole or in part, in fluid form for consumption" in the State, and includes producer-distributors and operators of stores or other establishments selling fluid milk at retail for consumption off the premises. See comment on the Highland Farms Dairy case, PART THREE.

within five days after the provisions of the act become effective in a market. Any person who begins business as a distributor after the law became effective must also apply for a license before he may begin such business. The commission may decline to grant a license, or may suspend or revoke one already granted, upon due notice and after a hearing, but the act does not prescribe any grounds for such administrative action.^{6/}

Records and reports.-- Although the act is silent in regard to the keeping of records by distributors, the commission, under its general powers, could no doubt require licensees to keep adequate records of their transactions in the purchase and sale of milk. As to reports, each licensee shall (as required by the commission) furnish to the commission verified reports containing such information as it may require.

Act requires no bonding of distributors.-- Bonding of distributors in order to insure payments to producers is not specified in the law.^{7/}

Cooperation with other authorities.-- "With a view of securing a uniformity of milk control", with respect to milk in interstate commerce, the commission is vested with power to confer and cooperate with the legally constituted authorities of other States and of the United States, and to enter into one or more compacts for such uniform system of milk control.

Provisions in Regard to Price Regulation

Prices to be paid producers.-- After public hearing and investigation, the commission "may fix the prices to be paid producers and/or associations of producers by distributors in any market or markets. . . ." "In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market, or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

Method of payment to producers; base rating.-- The act does not specifically authorize the commission to establish a system of base rating^{8/} other than as may be authorized by the words "quantity, or class of milk" used in the paragraph on price determination noted above; nor does the act provide a basis for market-wide pooling of returns to producers.

Resale prices.-- The commission, after public hearing and investigation, "may fix the minimum and maximum wholesale and retail prices to

^{6/} For remedy of the person aggrieved by any such action by the commission, see "Legal Remedies" below.

^{7/} See "Bonding distributors", PART TWO.

^{8/} See "Base rating", PART TWO.

be charged for milk in any market, and may also fix different prices for different grades of milk." The criteria for determining the reasonableness of prices to be charged at resale are the same as those requisite in fixing producer prices.

Powers With Respect to Unfair Competition and Trade Practices

Although the act does not specifically empower the commission to promulgate a code of fair trade practices^{9/} or fair competition, or to prescribe certain practices as unfair, such power appears implicit in the power of the commission to make and enforce "all rules, regulations and/or orders necessary to carry out the purposes of this act." The existence of certain economic trade practices is enumerated as constituting "a menace to the health and welfare of the inhabitants of the Commonwealth," including practices which are "unhealthful, unfair, unjust, destructive and demoralizing." Elimination of such practices may be construed as one of the law's objectives.

Limitations and Exceptions

One important limitation in the act has been stated, namely, that under certain conditions the commission shall be required to withdraw its exercise of powers from a market. A second important limitation is that the act shall in no way be construed to conflict with or repeal any laws "now in force" in the State relating to any board of health or sanitary code "now in force" in the State or in any municipality thereof, nor any municipal ordinances relating to the inspection, grading, production, sale, or distribution of milk. An exception to the commission's power to define a natural market area and to fix the limits of the production area (milkshed), within which milk shall be produced to supply any such market area, is the proviso that producers, producer-distributors, or their successors now shipping milk to any designated market may continue to do so until they voluntarily discontinue such shipping.

Violation

Unlawful acts.-- A distributor required to be licensed is forbidden to handle milk within the State unless he be duly licensed under the provisions of the act. It is declared unlawful for a distributor to buy milk from, or sell milk to, a distributor who is not licensed as required by the act. Also, it is unlawful for any distributor to deal in or handle milk if he has reason to believe it has previously been dealt in or handled in violation of the terms and provisions of the act. In addition, it is a misdemeanor for any person to fail, or refuse, to comply with a subpoena of the commission, or to violate "any provision of this act or of any license issued by the commission."

^{9/} See "Trade practices," PART TWO

Penalties.-- Any person failing or refusing to comply with a subpoena may, upon conviction, be punished by fine not exceeding \$100 or by imprisonment not exceeding 90 days, or both, and each day of such misdemeanor shall be deemed a separate offense. The penalty for violation of any provision of the act is, upon conviction therefor, a fine ranging from \$25 to \$100, or imprisonment for not less than 30 days nor more than one year, or by both fine and imprisonment, each day of such violation constituting a separate offense.

Legal Remedies

Board.-- Available to the commission, in certain cases where distributors or others do not comply with the provisions of the act, is its right to apply to the Hustings Court of the City of Richmond, and it shall be the duty of such court, or judge thereof, "to compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from said court, refusal to testify therein, or disobedience of an order or decree of such court." Failure to obey a subpoena, or to testify, or to comply with any rule, regulation, or order of the commission, is justification for the commission to apply to the court to institute such attachment proceedings. In addition to this, or any other remedy, the commission, in the event of violation of any provision of the act, may apply to any court of record in the City of Richmond "for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist." It is mandatory that prosecutions for violating the provisions of the act be "instituted by the Commonwealth's attorney of the Commonwealth, or otherwise, in any county or city of the Commonwealth of Virginia in which the provisions of this act are in effect."

Aggrieved parties.-- While one may hardly doubt that a person who considers himself adversely affected by any action or order of the commission may apply to some one of the Virginia courts for a review of such order, nevertheless the only legal remedy expressly provided in the act with respect to such person deals with licensing: "Any order of the commission in refusing to issue a license, or suspending or revoking a license, may be reviewed on appeal to the Supreme Court of Appeals."

Status of Cooperative Associations of Producers

Nothing is contained in the act with respect to the right of a producers' cooperative to pool the returns from milk which it markets for its members, or to pay them a blended price for such milk. Nor is such cooperative specifically required by the act to sell its milk in compliance with the regulations or orders of the commission. A producers' association "organized under the cooperative marketing act of

the Commonwealth of Virginia" is given certain rights; for example, it may, upon written application and under certain conditions, require the commission to "call a hearing" for the purpose of determining whether the commission shall exercise its power in a market, and the cooperative may, under certain conditions or circumstances, be entitled to select two or more of the five members of the local milk board. In addition, there is the proviso in the law that the making, under the provisions of the act, of marketing agreements between producers' cooperative marketing associations and distributors and producer-distributors shall not be deemed illegal or in restraint of trade.

PART TWO

I. Administrative Procedure, Rules, Regulations, and Orders.

General Exercise of Authority in State.— The Virginia Milk Commission has exercised its powers, as outlined in Part One, in 21 designated and established markets called "natural marketing areas". These milk markets (together with dates of applicable rules and regulations, and also order numbers with their effective dates since the last revision dates) are listed as follows: Roanoke, effective 6-15-34, revised 7-1-35, 7-1-36, 9-6-36; Danville, effective 7-1-34, revised 7-1-35, 7-1-36, 10-1-36; Harrisonburg, effective 7-1-34, revised 7-1-36, 12-1-36, order #91, 3-1-37; Staunton-Waynesboro, effective 7-22-34, revised 7-1-36; Lynchburg, effective 7-26-34, revised 7-1-36, 3-1-37; Petersburg-Hopewell, effective 7-27-34, revised 7-1-36, 10-1-36, order #85, 12-4-36 and order #92, 4-1-37; Newport News-Williamsburg, effective 8-13-34, revised 7-1-36, 10-1-36, order #88, 1-11-37 and order #90 2-11-37; Norfolk-Portsmouth, effective 10-1-34, revised 7-1-36, 10-1-36, order #84, 11-15-36 and order #87, 1-11-37; Suffolk, effective 6-1-35, revised 5-15-36, 2-1-37, 3-1-37; Covington-Clifton Forge, effective 6-16-35, revised 7-1-36, 11-1-36; Fredericksburg, effective 6-16-35, revised 7-1-36, 12-1-36; Altavista, effective 7-1-35; Blackstone-Kenbridge-Victoria-Crewe, effective 9-1-35, Blackstone-Kenbridge-Victoria-Crewe-Amelia, revised 12-1-36; Onancock, effective 1-1-36; Bowling Green, effective 3-1-36; Arlington-Alexandria, effective 4-1-36; Lexington, effective 9-17-36, order #83, 10-1-36; South Boston-Halifax, effective 10-1-36; Luray, effective 12-1-36; Tappahannock-Warsaw, effective 12-16-36; Abingdon-Marion-Wytheville, effective 1-16-37, order #89, 2-1-37. In each of these markets the Commission has established a "sales area" and a "production area", each with described boundaries.

Persons subject to regulations.— The Commission to date (3-15-37) has licensed 972 distributors and producer-distributors, including four stores that sell in Virginia but purchase their milk and cream from a distributor in Washington, D. C. (These are the only stores licensed by the Commission thus far.) Of this number only 610 licensees are now active in Virginia under State regulations.

Products subject to regulation.- In the case of producers in any market, milk is paid for on the basis of its use by the purchasing distributor. The 21 markets are broken down as follows as to their definition and classes of milk: One market has four classes, 12 markets three, 5 markets two, 2 markets one, and one market, entirely supplied by producer-distributors, has no prices established to be paid producers. One of the 12 markets (Fredericksburg) has cream and chocolate milk or drink in Class II. All of the other 11 markets classify cream and chocolate milk or drink, in Class I. The markets, according to classes, are as follows: Roanoke, 4; Danville, Harrisonburg, Staunton-Waynesboro, Lynchburg, Petersburg-Hopewell, Covington-Clifton Forge, Fredericksburg, Blackstone-Kenbridge-Victoria-Crewe-Amelia, Onancock, Bowling Green-Milford, Lexington, Altavista, 3; Suffolk, Arlington-Alexandria, Luray, Tappahannock-Warsaw, Abingdon-Marion-Wytheville, 2; Newport News-Williamsburg, Norfolk-Portsmouth, 1; South Boston-Halifax, 0.

Resale prices are fixed for fluid milk and fluid cream, cultured whole milk, chocolate milk, chocolate whole milk, buttermilk (churned or cultured), and skim milk (sweet or sour); also "certified or breed" milk and "special" milk.

Base rating; market-wide pools.- In each of 21 designated markets the commission has established, through the local milk board, bases for the producers, referred to as "basic allotment". In the Fredericksburg milk market, for example, "basic allotment" means "the established quantity of milk or cream set up by the Local Board for each producer on an equitable basis with all other producers for apportioning Class I and II sales among the producers"; and "basic quantity" means "the quantity of milk or cream each producer receives in Classes I and II." No rule or regulation provides for market-wide pooling.

Trade practices.- In each designated market, by order of the commission, there have been established "Rules of Fair Practice" for distributors in resale matters. Illustrative of these is the provision that no distributor "shall engage in any method or device", whether by discount, rebate, free service, combination sale, and otherwise, whereby milk is sold or offered for sale at a price other than as fixed by the commission.

Records and reports.- In a majority of the designated markets, licensees are required by the commission to keep records "in order that an accurate report can be made to the chairman of the Local Board or that the records may be checked at any time by an official representative of the Local Board or of the Commission." In several markets, however, this or similar requirement is not specified in official rules or regulations. In every market monthly reports are required of licensees, to be filed with the chairmen of the local boards. The report, among other things, shall state the total weight of milk and cream received from

each producer, his average butterfat test, the total weight and average butterfat test of the milk sold in the various classes established for the market, and information as to milk sold to or bought from other distributors.

Bonding distributors.- Although the act does not specifically provide for the bonding of distributors in order to insure payment for milk bought from producers, the commission has, in two^{10/} of the 12 markets, established such requirement by official regulation. An interesting feature is the provision that any distributor who begins to do business after the effective date of the regulation shall, as a condition precedent to engaging in such business, furnish to the local board a bond in conformity with the bonding provision applicable to distributors already licensed.

PART THREE

Legal Status

Litigation.- Actions of a legal nature in resistance to the authority of the Virginia Milk Commission have been few in number and unsuccessful. Two important cases will be briefly considered, one decided by the Supreme Court of Appeals of Virginia, the other by a specially organized three-judge Federal court. From the decision of the latter court, which was in favor of the commission, appeal was filed in the United States Supreme Court in December last, the case argued there March 8-9, 1937, and sustaining decision rendered on March 29.

Act Upheld by Virginia Supreme Court of Appeals.- The case of R. J. Reynolds vs. Milk Commission (163 Va. 957) came before the Supreme Court of Appeals on appeal from a decision rendered in the Law and Equity Court, Part Two, City of Richmond, in which the lower court had perpetually enjoined and restrained Reynolds and two other producer-distributors from distributing milk in the City of Staunton until licensed by the commission, and from selling milk in that market at any price other than that fixed by the commission. On November 15, 1934, the Supreme Court of Appeals held in favor of the farmer distributors and reversed the decision of the court below. Dissenting opinion was simultaneously filed, and upon rehearing, the court reversed its first decision and sustained the constitutionality of the act.^{11/} The two main questions decided were, Does the Act contravene the Virginia Constitution? and, Does it contravene the Fourteenth Amendment of the Federal

^{10/} Newport News-Williamsburg milk market and Petersburg-Hopewell milk market.

^{11/} Final decision rendered March 29, 1935.

Constitution? It was held that the act did neither. The court found a striking similarity between the Virginia act and the New York milk control act, and cited, in addition to two others, 12/ the case of *Nebbia v. People of New York* (291 U. S. 506) -- in which the United States Supreme Court had upheld the New York act, as controlling in the Reynolds case.

Federal court case.-- The other significant decision arose out of a suit in equity brought by the Highland Farms Dairy and Luther W. High 13/ to enjoin the commission from enforcing the Arlington-Alexandria regulations. Unconstitutionality of the act was alleged on the grounds of assumption of power to regulate interstate commerce, delegation of legislative powers, and denial of due process of law.

On questions of delegation of power and due process, the court held with the Virginia court in the Reynolds case. The court rejected the plaintiffs' contention that the act contemplated encroachment on Federal authority over interstate commerce. It also rejected plaintiffs' interpretation of the licensing clause and the definition of distributor, contained in the act, in the light of the "saving clause" (referred to in PART ONE) and the act as a whole. As a result, the court declared "that the act was not designed to apply to a distributor beyond the state either as to prices or licenses" and "does not forbid High from purchasing milk from the Dairy in the District of Columbia, or fix the price which he shall there pay." 14/

Decree affirmed by U. S. Supreme Court.-- Final disposition of the Highland Farms case was made on March 29, when the Supreme Court of the United States affirmed the decree of the court below. On the question of unlawful delegation of the legislative power, the court said this matter had been settled by the case of *Reynolds v. Milk Commission*, where the Supreme Court of Appeals of Virginia had denied there was unlawful delegation: "A judgment by the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere." With reference to alleged invalidity of the statute "in its present application by reason of a provision for the cancellation of the prices established for a market, if cancellation is requested by a majority of the producers and distributors in the area affected,"

12/ *Munn v. Illinois*, 94 U. S. 113, and *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389.

13/ *Highland Farms Dairy, Inc., and Luther W. High v. Milk Commission*, decided October 3, 1936, in the District Court of the United States for the Eastern District of Virginia, In Equity No. 363. (16 Federal Supplement 575)

14/ Highland Farms Dairy operates a milk plant in the District of Columbia, and buys milk from producers in Maryland and Virginia. Its entire milk supply is sold to Luther W. High, who retails it through a chain of retail stores which he operates in the District of Columbia, Virginia, or elsewhere.

the Court said that the power of cancellation had not been exercised or even threatened. "The controversy in that regard is abstract and conjectural," the Court declared, pointing out that "if a provision so subordinate were at any time to fail, the saving clause in section 16^{15/} would cause the residue to stand."

Nor did the Court find that the statute lays a burden on interstate commerce. On this the Court said in part: "Highland is not subject to the provisions of the act, and so the Milk Commission has ruled. Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale." ^{16/} The Court pointed out that if any doubt existed over construction of language of the statute, the doubt would be dispelled by the administrative practice of the commission and by the warning, expressed in section 14, that operations in interstate commerce shall not be deemed to be affected. (See footnote 15)

Finally, and in response to the allegation that the lack of statutory standards to guide the Commission in the granting and revocation of licenses was a violation of due process, the court found adequate protection in the right of appeal to the courts and pointed out the inappropriateness of such a complaint by one who had neither applied for nor had been refused a license.

The practical effect of this decision is to confirm the power of the State to fix the retail price of milk sold within the State, even though secured from outside sources, and to confirm the position taken by the commission that the High stores in Virginia are also subject to the licensing and assessment provisions of the act and as required by the commission's regulations.

^{15/} See "Statutory Protective Provisions," PART ONE

^{16/} At this point, the Court called attention to several of its former decisions, including *Sonneborn Bros. v. Cureton*, 262 U. S. 506. In that case the court said among other things that the oil had come to a state of rest and had become a part of the stock with which the appellants proposed to do business in the State and that the interstate transportation was at an end, and whether in the original packages or not.

